2013 IL App (1st) 11-3564-U

FIRST DIVISION
FILED: November 25, 2013

No. 1-11-3564



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Cook County. |
| Respondent-Appellee, | ) | |
| v. | ) | No. 04 CR 13513 |
| ALESHIA WAITES, | ) | Honorable Stanley J. Sacks, |
| Petitioner-Appellant. | ) | Judge Presiding. |

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* The decision of the circuit court dismissing the defendant's post-conviction petition is hereby affirmed.

¶ 2 The defendant, Aleshia Waites, appeals from the summary dismissal of her *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et seq.*)(West 2010), which alleged ineffective assistance of trial counsel. We affirm.

¶ 3 The defendant's conviction arose out of the suffocation death of her two-month-old daughter,

Kellise Waites, on May 8, 2004. Following a jury trial, she was found guilty of first-degree murder and sentenced to 60 years' imprisonment. On direct appeal, this court affirmed the defendant's conviction and sentence (*People v. Waites*, No. 1-08-0472 (2010) (unpublished order under Supreme Court Rule 23)). Thereafter, she filed her post-conviction petition (petition) alleging, *inter alia*, that her counsel was ineffective for 1) failing to order medical records or contact a witness who could have provided evidence of her post-partum mental instability; and 2) failing to contact witnesses who could have provided mitigating evidence during her sentencing. The trial court summarily dismissed the petition finding that it was frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2)(West 2010). The instant appeal followed.

¶ 4 The evidence relevant for consideration of this appeal may be summarized as follows. The defendant had two other children, Delilah and Asa. In 2003, she became pregnant with Kellise. While pregnant, the defendant met with Heather Sauer, a counselor from an adoption agency, and expressed an interest in placing her unborn child and her 18-month-old child, Asa, up for adoption. When Sauer indicated that the agency would only help if the defendant agreed to place the siblings together, the defendant became frustrated and discouraged. According to Sauer, the defendant stated that she had very little support and that she was feeling stressed and overwhelmed. Sauer further testified that the defendant characterized her pregnancy and 18-month-old child as "mistakes", and referred to her unborn child as a "bastard" and "dirt." Kellise was subsequently born on March 7, 2004.

¶ 5 About 8:30 a.m. on May 8, 2004, Saricha Washington, a friend of the defendant and godmother to Kellise, went to the defendant's apartment. Washington testified that after she arrived,

all three of the defendant's children awoke. Washington indicated that Kellise was crying and appeared fussy. She helped the defendant feed Kellise, and then left the apartment at 11:30 a.m.

¶ 6 Later that day, the defendant's neighbor, Mary Joseph, observed the defendant running back and forth to a telephone at a nearby laundromat. Joseph testified that when she asked the defendant what was wrong, the defendant responded that the baby was not breathing. Joseph went to the apartment and found Kellise lying on the bed. She tried unsuccessfully to revive the baby, after which the child was transported to the hospital by ambulance. Joseph testified that the defendant did not cry or show any emotion at first, and that, after the ambulance drove away, the defendant fell to her knees, and subsequently stated that "she might be going to jail."

¶ 7 At the police station, the defendant told Detective Cedrick Parks that, on the day of the offense, she returned home at approximately 12:30 a.m. From 1 a.m. until 8 a.m., Kellise awoke three times and stayed awake for approximately 30 minutes each time. At around 8 a.m., her friend, Saricha Washington, came over and helped take care of the children. After Washington left at approximately 10:40 a.m., Kellise began crying. The defendant stated that, when Kellise continued to cry, she placed the infant in a dresser drawer, covered her with blankets, closed the drawer, and left her there for several hours. The defendant testified that she did this because she was tired and wanted to get some sleep. She then went to bed for several hours, and when she awoke, she removed Kellise from the dresser drawer and observed that the infant was blue. The defendant stated that she attempted to render first aid, but Kellise did not respond. An ambulance later came and took Kellise to the hospital. An autopsy revealed that the infant had suffocated.

¶ 8 The defendant met with Assistant State's Attorney Suzi Collins. After speaking with Collins,

the defendant agreed to memorialize her statement on videotape. The defendant then provided a videotaped statement substantially similar to the statement she made to Detective Parks.

¶ 9 Over objections by the defense, the State introduced evidence of a prior incident of abuse on July 25, 2002, where the defendant struck her other daughter, Delilah, leaving a large bruise on the child's cheek and eye. The defendant told the police that she had struck the child because she was upset over losing her job.

¶ 10 During a discovery status hearing, defense counsel informed the court that she was awaiting records from the defendant's psychological and psychiatric counseling. After discovery was completed, defense counsel requested that the defendant undergo a clinical evaluation to determine her sanity at the time of the offense, her fitness to stand trial, and her competence to waive her rights under *Miranda*. In preparation for the hearings, counsel had obtained the defendant's prior medical records going back to 1993, when, at age 12, she was hospitalized for attempted suicide. Defense counsel also received records from a second hospitalization at age 16 for depression, defendant's psychological history subsequent to the offense, and DCFS records relating to parenting assistance provided to the defendant. On July 5, 2005, the defendant was seen by Dr. Peter Lourgos for the purpose of assessing her sanity at the time of the offense; however, Dr. Lourgos reported that the defendant was uncooperative during the examination and refused to provide basic background information. At one point, when he attempted to engage her to cooperate, the defendant lifted the examination table and slammed it to the ground, asking "do you think I'm stupid?" According Dr. Lourgos, the defendant's uncooperativeness and hostility were "volitional and not the product of any known mental illness." Defense counsel subsequently requested and was granted another order for

a clinical assessment of the defendant's sanity at the time of the offense.

¶ 11 On September 30, 2005, and October 12, 2005, Dr. Sharon Coleman examined the defendant and concluded that she was "legally sane" at the time of the offense. In her report, Dr. Coleman thoroughly recounted the defendant's description of events in the days and hours leading up to the offense, including her feelings of being depressed and overwhelmed. Dr. Coleman reported that, after a "review of records, the examination, defendant's disclosures and results of psychological testing," the defendant "did not suffer from a major mental illness or defect that precluded an appreciation of the criminality of her conduct" at the time of the offense. Dr. Coleman also screened the defendant for malingering. In this assessment, the defendant presented in a manner "highly suggestive of malingering." Another test disclosed that the defendant could have "a tendency to magnify illness."

¶ 12 On September 7, 2006, defense counsel filed a motion for continuance, contending that it had retained another expert, Dr. Carl Wahlstrom, to provide a second opinion as to the defendant's sanity at the time of the offense, and also to determine her fitness to stand trial. To assist Dr. Wahlstrom in formulating his opinion, defense counsel provided him with the defendant's medical and psychiatric records going back to 1993; her family history of mental illness; adoption agency records pertaining to the defendant's efforts to place all three of her children for adoption; a police report for the prior abuse of Delilah; and pregnancy records for the birth of Kellise, which noted "no mention of depression or psychosis." Despite these records, however, defense counsel apparently submitted no report from Dr. Wahlstrom regarding the defendant's mental state at the time of the offense.

¶ 13 On October 10, 2006, the defense filed Dr. Wahlstrom's report regarding the defendant's

fitness to stand trial. The report indicated that, while she understood the criminal proceedings, the defendant was mentally unfit based upon her inability to manage her behavior or assist in her defense. The State proffered a second opinion by Dr. Roni Seltzberg, who concluded that the defendant was fit for trial with her present medications. Following a hearing, the trial court found the defendant fit to stand trial.

¶ 14 During the sentencing hearing, the defense presented testimony by the defendant's mother, Monica McCalpin, and grandmother, Sheleby McCalpin, as to the defendant's childhood depression, her overwhelmed state of mind during the period preceding the offense, her parenting classes and assistance from DCFS. The State also noted the evidence that the defendant had previously been employed and gone to college. In allocution, the defendant stated that she loved her children and did everything in her power to care for them. She described Kellise as the "most precious thing" and her "favorite child." In mitigation, defense counsel argued that the defendant was "beyond overwhelmed," that she had a mental health history, and no prior convictions. In sentencing the defendant, the court noted that the defendant had a "sad" history and was not in the best situation, but that this was not an excuse to kill her child. The court gave no credence to the defendant's statement that Kellise was her favorite child, noting that, before the child was even born, she had referred to her as a "bastard" and "dirt," and had attempted to place her and the other children for adoption. The defendant was then sentenced to 60 years' imprisonment.

¶ 15 The post-conviction petition consisted of a narrative detailing the events in the days preceding the death of Kellise. We summarize these allegations as necessary for the issues in this appeal. On May 5, 2008, the defendant left her children to be cared for by her grandmother "Liz" and

later with her mother. The defendant did this with "much hesitancy," but stated that her "moods were really low an[d] erraticly [sic] unstable" and she cried uncontrollably from time to time because she missed her children, her rent was due, and she needed a job and to enroll in school. She then proceeded to a friend's home, where she was offered a drink and marijuana. She initially declined, and stated that maybe she should go get her prescription filled for "the Zoloft that was prescribed by a midwife Gail Dennis." The defendant subsequently smoked the marijuana, and later learned that it had been laced with the narcotic "angel dust." On May 7, 2008, the defendant drove to meet with Kellise's father, in an effort to obtain money for the child and to have his name placed on the child's birth certificate. The father then requested that, in exchange for the money the defendant wanted, the defendant perform a sexual act with him.

¶ 16 The petition alleged that immediately after meeting with Kellise's father, the defendant returned to her mother's house to find everything "completely chaotic," with the children being "rambunctious" and Kellise crying. She, her mother and the children later went to the home of her grandmother McCalpin for dinner. Several hours later, the defendant returned home with her children. In the hours leading up to the offense, she described her mental state as frantic with suicidal thoughts and feelings like she was losing her sanity. In conjunction with this narrative, the defendant attached a list entitled "names of probable witnesses," with brief summaries of their alleged testimony. At one point, the attachment notes that her counsel either failed to contact the witnesses or determined them to be "not good witnesses."

¶ 17 On appeal, the defendant first argues that her trial counsel was ineffective for failing to call or contact Gail Dennis, her alleged midwife in the delivery of Kellise, whom she contends prescribed

medication to her following the birth of the infant, and could attest to her post-partum depression. She asserts that, with the benefit of this alleged evidence, the court may have found her to be insane at the time of the offense, or at least guilty but mentally ill.

¶ 18 The Act enables a defendant to challenge the proceedings leading to her conviction if they resulted in a substantial violation of her constitutional rights. 725 ILCS 5/122-1(a) (West 2010). In a non-capital case, a post-conviction proceeding has three distinct stages. *People v. Gaultney,* 174 Ill. 2d 410, 418, 675 N.E.2d 102 (1996). If the petition is not dismissed at the first stage, it proceeds to the second stage, where the State may move to dismiss or otherwise answer the petition, and counsel may be appointed for an indigent defendant upon request. 725 ILCS 5/122-5 (West 2010). If the proceedings advance to the third stage, the circuit court may conduct an evidentiary hearing. 725 ILCS 5/122-6 (West 2010); *Gaultney,* 174 Ill. 2d at 418. In the case at bar, we are concerned only with first-stage dismissal.

¶ 19 In the first stage, the court must independently review the petition and determine whether it "is frivolous or patently without merit." 725 ILCS 5/122 - 2.1 (West 2010). To survive dismissal at this stage, a petition need only present the "gist" of a constitutional claim. *People v. Hodges,* 234 Ill. 2d 1, 9, 912 N.E.2d 1204 (2009); *Gaultney*, 174 Ill. 2d at 419. This is a low threshold, and a defendant is required only to include a limited amount of detail in the petition, and need not make legal arguments or cite to legal authority. *People v. Porter*, 122 Ill.2d 64, 74, 521 N.E.2d 1158 (1988). The low threshold does not mean, however, that a *pro se* petitioner is excused from providing any factual detail surrounding the alleged constitutional violation. *Hodges,* 234 Ill. 2d at 10. The Act also requires that the petition have attached affidavits, records, or other evidence

supporting its allegations, or state why these are not attached. 725 ILCS 5/122-2 (West 2010); *Hodges*, 234 Ill. 2d at 10. The purpose of this requirement is to establish that a petition's allegations are capable of objective or independent corroboration. *People v. Delton*, 227 Ill.2d 247, 254, 882 N.E.2d 516 (2008), citing *People v. Collins*, 202 Ill.2d 59, 67, 782 N.E.2d 195 (2002). Further, in considering the petition at the first stage, this court may examine the court file of the proceedings at which the defendant was convicted; any action taken by an appellate court in such proceeding; and any transcripts of such proceeding. 725 ILCS 5/122-2.1(c) (West 2010). If our review of these records reveals that they positively rebut the allegations in the petition, dismissal of the petition is proper. *People v. Jones*, 399 Ill. App. 3d 341, 356-57, 927 N.E.2d 710 (2010) citing *People v. Coleman*, 183 Ill. 2d 366, 382, 701 N.E.2d 1063 (1998).

¶ 20 In order to prevail on a claim of ineffective assistance of counsel, the burden rests with the defendant to show that 1) counsel's performance fell below an objective standard of reasonableness, and 2) there is a reasonable probability prejudice occurred as a result. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *People v. Villarreal*, 198 Ill.2d 209, 228, 761 N.E.2d 1175 (2001). Sufficient prejudice will be found to exist where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698; *People v. Erickson*, 183 Ill.2d 213, 224, 700 N.E.2d 1027 (1998). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

¶ 21 In the case at bar, the petition is notarized and contains a sworn statement attesting to the

truth of the matters contained therein. Beyond this, it is devoid of any supporting affidavits, records or other evidence as required under the Act. Under the attachment listing the "probable witnesses," the defendant merely alleges that Dennis "could have testified as to why [she] was prescribed pshyc (sic) meds, after the delivery of Kellise Waites, and not after the delivery of the other two children which she has previously helped to deliver." At another point, the defendant makes an assertion that Dennis prescribed Zoloft for her, adding simply "partum depression." However, there is no statement or record from Dennis or any other individual verifying these assertions. Furthermore, the defendant fails to explain why she was unable to obtain an affidavit or other statement from Dennis. Instead, this court is left to speculate as to whether Dennis could have testified favorably regarding the existence or extent of her alleged illness. For this reason, there is no basis for further review by this court. See *People v. Enis*, 194 Ill. 2d 361, 380, 743 N.E.2d 1 (2000). It is well-settled that, a claim of trial counsel's failure to investigate or call a witness must be supported by an affidavit from the proposed witness. See *Jones*, 399 Ill. App. 3d at 371, citing *Enis*, 194 Ill. 2d at 380.

¶ 22 In addition, our review of the record refutes the defendant's argument. Defense counsel compiled the defendant's social and educational history, medical and hospitalization records from the time she was a child until after the offense, and reports of psychological and psychiatric counseling after the offense. Based upon this information, she sought and was granted leave for the defendant to undergo two separate clinical evaluations of her sanity at the time of the offense, which proved that the defendant was legally sane, and that she in fact showed some tendency to malinger. Defense counsel then requested a third examination, which apparently also failed to demonstrate any mental illness at the time of the baby's death. Based upon these facts, we are hard-pressed to

conclude that counsel simply failed to obtain medical evidence from Dennis that could have proved favorable to the defense. Instead, it appears that counsel opted not to pursue a theory of mental instability at the time of the offense due to very strong evidence undermining that fact. Counsel's judgment as to which witnesses to call and strategy to use are generally not subject to question under the *Strickland* analysis. See *People v. Barcik*, 365 Ill. App. 2d 183, 191-92, 848 N.E.2d 579 (2006). In this case, we are unable to conclude that counsel's performance "so undermined the proper functioning of the adversarial process" that it resulted in an unjust result for the defendant. *Barcik*, 365 Ill. App. 3d at 192.

¶ 23 The defendant also contends that defense counsel failed to contact or investigate witnesses that could have provided evidence to mitigate her sentence. We disagree.

¶ 24 Again, with regard to most of these alleged witnesses, the defendant fails to provide any affidavits, but explains either that she could not remember their names or phone numbers, or that they did not return her call. She does include three letters from former co-workers, notarized but unsworn, two of which were supervisors, stating that she was reliable and a good, trustworthy employee.

¶ 25 However, there is no basis to conclude that the omission of these witnesses prejudiced the defendant with regard to her sentence. She received 60 years' incarceration, the minimum time under the extended sentence range as provided under the Unified Code of Corrections (730 ILCS 5/5-8-2(a)(1) (West 2004)). Further, in imposing sentence, the trial court stated that, while he was made well aware of the defendant's life, he was more influenced by the heinous manner in which she killed the child whom she claimed to be "the most precious thing" and her "favorite," and which the

evidence suggested she never really wanted. Accordingly, we are unable to conclude that letters from co-workers years before the offense could have affected the outcome of her sentencing hearing.

¶ 26 For the foregoing reasons, the judgment of the circuit court dismissing the defendant's petition is affirmed.

¶ 27 Affirmed.